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NO. 82-455

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN CUNEO, INC.

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

BRIEF FOR ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., IN OPPOSITION

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QUESTIONS PRESENTED

Whether, in the circumstances of this case, the National Labor Relations Board exceeded its discretionary authority by issuing a retroactive bargaining order to remedy the Company's serious and pervasive unfair labor practices.

TABLE OF AUTHORITIES

Cases	Pages
Ann Lee Sportswear, Inc. v. NLRB, 543 F.2d 739 (10th Cir. 1976)	12
California v. Taylor, 353 U.S. 553 (1957)	10
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Cases	Pages
Ploof Transfer Co., 201 NLRB 828 (1973), enf'd, 485 F.2d 686 (5th Cir. 1973)	13
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OPINIONS BELOW

The opinion of the court of appeals (A1-30) is reported at 681 F.2d 1. The decision and order of the National

Labor Relations Board (A31-76) is reported at 253 NLRB 1025.

JURISDICTION

The judgment of the court of appeals issued on June 18, 1982. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act of 1935, as amended (49 Stat. 449, 29 U.S.C. §160(c)), provides in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board

shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . .

STATEMENT OF THE CASE

A. Facts

Road Sprinkler Fitters Local Union No. 669, U.A. ("the Union") began organizing the employees of John Cuneo, Inc. ("the Company") on September 15, 1977. Eleven of the Company's 14 employees signed a Union authorization card that day. (A. 50, 32, 3). On September 16, Union officials informed the Company that they represented a majority of the Company's employees and requested

recognition and bargaining. The Company refused and suggested that the Union seek an election through the National Labor Relations Board ("the Board"). (A. 51, 32-33, 3).

Immediately after rejecting the Union's demand for recognition, the Company began its campaign of unfair labor practices. Company President Robert Splawn twice unlawfully interrogated employee Gerald Hall on September 16 and directed supervisor Ray Collins to discover who had signed the authorization cards. Collins thereupon unlawfully interrogated employee Ted Hall and told him he had been instructed to discover the identity of the Union's supporters. (A. 51-52, 55, 33, 3-4). On September 18, Splawn threatened Gerald Hall with discharge if he refused to sign an

affidavit which falsely asserted that he was a supervisor. (A. 52, 33, 4).

On September 20, the employees agreed to strike unless the Company recognized the Union the next day. When Splawn refused, eight of the ten employees on duty struck and began picketing on September 21. Splawn immediately threatened to replace them permanently if the strike did not end in fifteen minutes. (A. 56, 33-34, 5). On September 23 and October 14, Company agents photographed the peaceful pickets. (A. 57, 34, 5).

The strike ended on November 14 when the Union unconditionally requested the reinstatement of seven strikers. None of the seven was immediately offered reinstatement. Despite hiring new employees on November 25 and 30, 1977 and January

17, 1978, the Company did not recall any strikers until February 1, 1978. (A. 61-62, 34-35, 15, 6).

After recalling the first two strikers, Splawn told them that they should not talk about the Union on the job. They were also warned not to be late again and were threatened with discharge if they were late in the future. Prior to the advent of the Union campaign, the Company had no such policies. (A. 61-62, 34, 6-7).

B. The Board's Decision and Order

The Board concluded that the Company violated Section 8(a)(1) of the Act by interrogating and threatening Gerald Hall, by creating the impression of surveillance, by engaging in surveillance and by promulgating a rule

prohibiting employees from discussing the Union in the plant; and violated Section 8(a)(3) by promulgating stricter disciplinary rules, by threatening employees with discipline if they violated those rules and by refusing to reinstate the unfair labor practice strikers immediately upon their unconditional request for reinstatement. The Board further concluded that the Company violated Section 8(a)(5) by refusing to bargain with the Union on September 16, when it represented a majority of the employees in an appropriate unit. (A. 40).

In reaching these conclusions, the Board rejected the Administrative Law Judge's finding that the employees engaged in an unfair labor practice strike from the inception. Rather, the Board held that the employees commenced

an economic strike nature of which was thereafter converted by the Company's unfair labor practices. (A. 32, 35-37).

C. The Decision of the Court of Appeals

The court of appeals enforced the Board's Order in full. It concluded that the Board's factual findings were "supported by substantial evidence." (A. 3, 9). The court also concluded that the Board had properly directed the reinstatement with back pay of the strikers (A. 24-30) and had properly directed the Company to bargain with the Union. (A. 17-23).

REASONS FOR DENYING THE WRIT

1. Although portions of the Board's Decision and Order were expressly predicated upon Drug Package Co., Inc., 228 NLRB 108 (1977), enf'd as modified, 570 F.2d 1340 (8th Cir. 1978) (A. 36-39), the Company did not contest either the validity or the applicability of Drug Package to the facts of this case in its briefs to the Board or to the court of appeals.[1/] Certiorari is inappropriate where the issue presented to this Court was not urged and briefed to the court of appeals. Neely v. Eby Construction Co., 386 U.S. 317, 330 (1967); Lawn v. United States, 355 U.S. 339, 362, n. 16

1/ If this Court deems it appropriate, the Company's briefs can be submitted to the Court to establish this point.

(1958); California v. Taylor, 353 U.S. 553, 557, n. 2 (1957). It is not enough that the opinion below may have mentioned and discussed a matter not properly raised by the Petitioner. Tyrell v. District of Columbia, 243 U.S. 1, 5-6 (1916). The Company is, therefore, foreclosed from raising the issue upon which its petition for a writ of certiorari is primarily based.

2. Certiorari is not necessary where, as here, the decision below is consistent with opinions of this Court and where, as here, there is no division among the courts of appeals on the issue. The Drug Package doctrine logically builds upon several uncontested and well established principles of labor law. An employer may, regardless of motive, refuse a union's demand for recognition based

upon a card majority and may compel a union to demonstrate its majority support in a Board-conducted election. Nevertheless, an employer who rejects a demand for recognition may not use the interval before the election to commit unfair labor practices in an attempt to destroy the union's support. Linden Lumber Division v. NLRB, 419 U.S. 301, 310 (1974); NLRB v. Gissel Packing Co., 395 U.S. 575, 600 (1969). If the employer's unfair labor practices preclude the holding of a free and fair election, the employer's refusal of recognition becomes unlawful and the employer will be ordered to bargain with the union. Id. at 614-615. The bargaining order will be retroactive to the date the union demonstrated majority support and demanded recognition or to the date of the first

unfair labor practice, whichever is later. Trading Port, Inc., 219 NLRB 298 (1975). Petitioner did not contest the application of Trading Port before the court of appeals and may not do so now. However, the Trading Port doctrine has been generally accepted by the courts of appeals. See, e.g., Ann Lee Sportswear, Inc. v. NLRB, 543 F.2d 739, 744 (10th Cir. 1976); NLRB v. Solboro Knitting Mills, Inc., 572 F.2d 936 (2d Cir. 1978), cert. denied, 439 U.S. 864.

In Drug Package, the Board held that an economic strike for recognition is converted into an unfair labor practice strike where the employer's independent unfair labor practices combine to convert the initially lawful refusal of recognition into a separate unfair labor practice. Supra, 228 NLRB

at 112. The Board does not reach the Drug Package issue until it has determined that the refusal to bargain was unlawful and that a retroactive bargaining order is necessary. Drug Package is one result of the bargaining order, not the rationale for the bargaining order. Each court of appeals which has considered Drug Package has accepted this proposition. Drug Package, Inc. v. NLRB, 570 F.2d 1340, 1348 (8th Cir. 1978); NLRB v. Lyon & Ryan Ford, Inc., 647 F.2d 745, 754 (7th Cir. 1981), cert. denied, 454 U.S. 894. Even prior to Drug Package, the Board and courts agreed that where an unlawful refusal to bargain caused or contributed to a strike, the strike was an unfair labor practice strike. See, e.g., Ploof Transfer Co., 201 NLRB 828 (1973), enf'd, 485 F.2d 686 (5th Cir. 1973).

3. The Company's alternative basis for seeking a writ is without merit. Whether the Board properly concluded that the Company's unfair labor practices so polluted the atmosphere that a free and fair election could not be held is a factual and evidenciary question, as the Company has itself conceded. Petition, p. 10. This Court does "not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). Both the Board (A. 36-37) and the court (A. 13-15) agreed that the Company violated Sections 8(a)(3) and (1) by, inter alia, failing to accord the economic strikers their potential recall rights. They further agreed that the Company's accumulated unfair labor practices constituted a violation

of Section 8(a)(5) and necessitated a remedial bargaining order. There is no reason for this Court to review these factual determinations which the court below found to be supported by substantial evidence. (A. 3, n. 1).

CONCLUSION

For the reasons stated herein, the Petition should be denied.

Respectfully submitted,

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